Florida State University Journal of Land Use and Environmental Law

Volume 13
Number 1 *Fall 1997*

Article 5

April 2018

Retroactive Liability Under the Superfund: Time to Settle the Issue

Nancy K. Kubasek
Bowling Green State University

Carrie Williamson

Rachael Vigil

RETROACTIVE LIABILITY UNDER THE SUPERFUND: TIME TO SETTLE THE ISSUE

NANCY K. KUBASEK,* CARRIE WILLIAMSON,** AND RACHAEL VIGIL***

Table of Contents

I. INTRODUCTION

Over the past two years, reauthorization of Superfund legislation has been a hotly debated topic.[1] A primary issue in these debates has been to what extent should retroactive liability be limited under the law.[2] Before Congress acted on any proposal to limit retroactive liability, a federal district court judge issued a controversial ruling holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[3] did not apply retroactively to impose liability for waste disposed prior to the law's enactment in 1980. The controversial case was *United States v. Olin*,[4] decided by Senior District Court Judge Hand in May 1996. Even though this decision was later reversed on appeal, this case briefly gave hope to those who did not favor retroactive liability.[5]

---

* Professor of Legal Studies, Bowling Green State University. B.S. Education, 1978, Bowling Green State University; J.D., 1981, University of Toledo College of Law. Since this speech was written as part of Ms. Browner's duties as a U.S. Government employee, the *Journal*'s copyright provision does not attach. Please credit the U.S. Environmental Protection Agency whenever reproducing any parts of this speech.

** Research assistant to Professor Kubasek.

*** Research assistant to Professor Kubasek.

1. *See infra* Part III.

2. *See id.*

3. Pub. L. No. 95-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675) (1994)).

4. 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

5. *See infra* notes 12-14 and accompanying text.

In *Olin*, the United States filed an action under CERCLA against the Olin Corporation, a Virginia corporation that operates a chemical plant in Alabama.[6] A proposed consent decree was filed with the complaint.[7] After reviewing the parties' briefs on constitutional and statutory issues relating to CERCLA, Judge Hand denied the consent decree and dismissed the case on two grounds.[8] First, Congress did not clearly express an intent that the liability provision of CERCLA should be applied retroactively, as required by the decision in *Landgraf v. USI Film Products*.[9] Second, the application of CERCLA violated the Commerce Clause as interpreted in *United States v. Lopez*.[10]

Even though the circuit court struck down the *Olin* decision on appeal,[11] a number of industry and insurance groups were supportive of the lower court decision and believed that the court correctly stated the law regarding retroactive liability.[12] For example, the Washington Legal Foundation, the American Insurance Association, the National Association of Independent Insurers, and the Reinsurance Association of America publicly expressed their support for the lower court ruling.[13] Moreover, some Republicans in Congress called the original decision a "watershed event in Superfund reform."[14] Even though Judge Hand attempted to restrict retroactive liability, this issue may not be resolved until Congress amends the Superfund law or the United States Supreme Court addresses the precise issue of retroactive liability under CERCLA.

This article addresses the issue of retroactive liability in hopes of proffering a legislative solution to the divisive issue. Part II examines the history of CERCLA. Part III analyzes the reasoning of the *Olin* decision, how other courts reacted, and its reversal in *Olin II*. Part IV examines the ongoing debate in Congress. Part V concludes

---

6. *See* 927 F. Supp. at 1504.

7. *See id.*

8. *See id.*

9. 511 U.S. 244 (1994) (deciding that since Congress did not expressly allow for retroactive application of the Civil Rights Act of 1991, the Act could not be applied retroactively in a Title VII case).

10. 514 U.S. 549 (1995) (holding that Congress exceeded its commerce clause authority when it passed the Gun-Free School Zones Act since possess of a gun was not an economic activity that substantially affected interstate commerce).

11. *See Olin*, 107 F.3d 1506 (11th Cir. 1997) (reversing the district court by holding that there was no commerce clause violation and that CERCLA liability costs do apply retroactively).

12. *See Insurers Have Their Say*, HAZARDOUS WASTE NEWS, Sept. 16, 1996, *available in* 1996 WL 7981946.

13. *See id.*

14. Mark D. Tucker, *Retroactive Liability is Challenged*, NAT'L. L.J., Oct. 14, 1997, at C1.

by suggesting a legislative solution to this issue, and calling for legislation affirming CERCLA retroactive liability.

II. A LEGISLATIVE AND CASE LAW HISTORY OF CERCLA

A. Initial Purpose and Passage of CERCLA

Although various laws existed in 1979 that addressed many impacts hazardous substances had on the environment,[15] Congress recognized that a gap existed in those regulations.[16] That gap encompassed the problems caused by inactive or abandoned waste disposal sites described as the most serious health and environmental problem of the decade.[17] Thus, CERCLA was passed to provide for the cleanup of inactive hazardous wastes sites.[18] CERCLA was actually an amalgamation of several bills.[19] Although

---

15. *See, e.g.*, Clean Air Act (CAA), 42 U.S.C.A. § 7041 (1997) (regulating air pollution emissions); Clean Water Act (CWA), 33 U.S.C.A. § 1251 (1997) (regulating toxic water pollutants); Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2601 (1997) (regulating potentially toxic chemicals used in commerce); Solid Waste Disposal Act (SWDA), *as amended by* the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6901 (1997) (establishing a comprehensive system to regulate hazardous waste from its creation to its disposal).

16. *See* S. REP. NO. 69-848, at 101-12 (1980), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) [hereinafter 1 LEGISLATIVE HISTORY] ("[T]he regulations do not address those situations where an owner is unknown or is unable to pay the cleanup costs, nor do they address the cleanup of spills, illegal dumping or releases generally.").

17. *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 2 ("The legacy of past haphazard disposal of chemical wastes and the continuing danger of spills and other releases of dangerous problems pose what many call the most serious health and environmental challenge of the decade.").

18. *See id.* (stating that CERCLA was to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."); *Administration Testimony to the Subcomm. on Env't Pollution & Resource Protection, Comm. on Env't & Public Works*, 96th Cong. (1980) *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 16, at 55 (statement of Sen. John C. Culver) ("In these hearings, we are searching for solutions to the problems of how to cleanup old hazardous waste dump sites that now threaten our environment, and for ways to cleanup future spills of hazardous wastes."); *id.* at 100 (statement of Thomas C. Jorling, Assistant Administrator, Water & Waste Managt., EPA) ("The proposed legislation addresses releases to the environment of oil, hazardous substances, and hazardous wastes from spills and from inactive and abandoned disposal sites.").

19. *See* H.R. 7020, 96th Cong. (1980), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), at 391-463 [hereinafter 2 LEGISLATIVE HISTORY] (describing the Hazardous Waste Containment Act of 1980).

> [A]n act to amend the Solid Waste Disposal Act to provide authorities to respond to releases of hazardous waste from inactive hazardous waste sites which endanger public health and the environment, to establish a Hazardous Waste Response Fund to be funded by a system of fees, to establish prohibitions and requirements concerning inactive hazardous waste sites, to provide liability of persons responsible for release of hazardous waste at such sites, and for other purposes.

little consensus existed on certain aspects of the combined Senate and House bill,[20] Congress realized the importance of legislation that would immediately address the problem of inactive or abandoned waste sites.[21] Therefore, both the House and the Senate passed the compromise bill, CERCLA.[22]

B. Early Interpretations of Retroactivity

While CERCLA was enacted in 1980, the issue of retroactive liability was not raised in the courts until 1983 when *Brown v. Georgeoff*[23] was heard.[24] *Georgeoff* addressed the question of

---

Id.; H.R. 85, 96th (1980), *reprinted in* 2 LEGISLATIVE HISTORY, at 1016-1114 (describing the Comprehensive Oil Pollution Liability and Compensation Act as "a bill to provide a comprehensive system of liability and compensation for oil-spill damage and removal costs, and for other purposes."); S. 1480, 96th Cong. (1980), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 16, at 462-552 (describing the Environmental Emergency Response Act as "a bill to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites.").

20. *See* Letter from Robert T. Stafford & Jennings Randolph to Rep. James J. Florio (Dec. 2, 1980), *in* 1 LEGISLATIVE HISTORY, *supra* note 16, at 774-75.

> On Monday, November 24, the Senate passed a compromise "superfund" bill . . . . That the bill passed at all is a minor wonder . . . Specific mention has been made of adding an oil spill provision. That was suggested in the Senate, but agreement could not be reached on a specific provision, so none was offered . . . Some disagreed with increasing the size of the Fund. Others disagreed with the creation of a private right of action, whether against a Fund or against a spiller. Others disagreed with preemption provisions. Others disagreed with limitations on liability, especially as they related to inland oil barges. In short, we could not even reach a consensus, much less unanimity.

Id.

21. *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 762 (statement of Sen. Domenici) ("[T]he problem of hazardous substances must be addressed, and this body is acting in a responsible manner by passing legislation in this Congress."); *id.* at 765 (statement of Sen. Weicker) ("[W]e cannot let any time pass before we take the problem of hazardous wastes head on. We must pass the superfund bill now."); *id.* at 767 (statement of Sen. Riegle) ("I . . . hope the House will act on it before adjournment. We cannot afford to wait any longer in establishing the necessary framework and funding to meet the hazards posed by toxic wastes."); *id.* at 784 (statement of Rep. Florio) ("The time is now to deal with this problem . . . The concern is whether we are going to have legislation or whether we are not going to have legislation.").

22. The Senate passed the compromise bill on Nov. 24, 1980. *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 560. The House passed the compromise bill on December 3, 1980. *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 776. For further discussion of the legislative history of the bills, *see* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund")*, 8 COLUM. J. ENVTL. L. 1 (1982).

23. 562 F. Supp. 1300 (N.D. Ohio 1983).

24. However, several earlier cases had compared CERCLA to RCRA to illustrate RCRA's inadequacies. *See generally* United States v. Waste Indus., 556 F. Supp. 1301, 1317 (E.D.N.C. 1982) ("Congress recognized . . . a gap existed in the regulatory scheme fashioned through the RCRA. That gap involved the problems caused by inactive waste disposal sites . . . [t]he Superfund legislation was designed to fill that void."). *See also* United States v. Wade, 546 F. Supp 785 (1982); Philadelphia v. Stepan Chem. Co., 544 F. Supp 1135 (E.D. Pa. 1982); Grad, *supra* note 22, at 35 ("CERCLA picks up where RCRA leaves off, i.e., when untoward emergencies occur, or when spills occur at current or no longer active sites by making provisions for protection after a site has been closed.").

imposing liability on contributors for pre-enactment waste activities.[25] Although no court had yet ruled on the issue of retroactive liability under CERCLA, Judge Dowd facilitated his decision in *Georgeoff* by applying the general reasoning that previous courts used when deciding the issue of retroactivity under other statutes.[26] Using Judge Sirica's framework in Windsor v. State Farm Insurance Co.,[27] Judge Dowd first examined the language of CERCLA, specifically examining Section 107.[28] The State argued that the past tense verb usage "must be construed to apply to conduct occurring before

---

25. In *Georgeoff*, the state attempted to cleanup the hazardous waste disposal site owned by Summit National Liquid Services (SNLS), commonly known as Deerfield Dump (Dump). *See* 562 F. Supp. at 1300. The state alleged that an assortment of hazardous wastes had been left at the Dump. *See id.* The Dump went through a series of owners after SNLS went out of business in 1979; however, the waste left at the Dump continued to pose a threat to the source of drinking water in the area. *See id.*

26. *See id.* at 1303 (quoting J. Story in *Society for Propagating the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13, 156) (defining a retroactive law as one that "creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past . . .").

27. *See* 509 F. Supp. 342 (D.D.C. 1981).

> The Court's analysis must begin with the fundamental rule of law that the meaningful intent of a statute is to be sought first in the language it is framed. If the language is plain and unambiguous, then there is no need to enlist the rules of interpretation, and the duty of the Court is to enforce the act according to its terms . . . . When the imperative character necessary to demonstrate retroactive intent cannot be assigned to the words of the Act, the Court must look at the various indica of Congressional intent.

Georgeoff, 562 F. Supp. at 1308.

28. *See Georgeoff*, 562 F. Supp. at 1308-09. Section 9607 provides for liability under CERCLA:

> (a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all cost of removal or remedial action incurred by the United States Government or a States or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, includeing the reasonable costs of assessing injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

the enactment."[29] Judge Dowd noted that other sections of CERCLA supported the view that CERCLA should be applied to pre-enactment conduct.[30] Due to CERCLA's ambiguous wording, Judge Dowd examined the legislative history of the statute.[31] He concluded that "[t]he Congressional intent to make industry pay for the cleanup costs must be interpreted as an intent to authorize lawsuits which impose liability retroactively upon transporters."[32]

Another early case that addressed retroactive liability was *United States v. Northeastern Pharmaceutical & Chemical Co. (Northeastern Pharmaceutical)*.[33] In *Northeastern Pharmaceutical*, the court concluded that Sections 104,[34] 106(a),[35] and 107(a)[36] of CERCLA were intended

---

42 U.S.C.A. § 9607 (1983).

29. 562 F. Supp. at 1310.

30. *See id.* at 1311. Judge Dowd describes the frequent references to "inactive" waste disposal sites and concludes that Congress intended to focus on the past, rather than future conduct. *See id.* (citing 42 U.S.C. § 9601 (20) (A) (iii) which states in the Preamble the purpose "to provide for . . . the cleanup of inactive hazardous waste disposal sites).

31. *See id.* at 1311-12 ("A more generalized examination of the Congressional debates concerning CERCLA indicates an unequivocal Congressional intent to effect the complete cleanup of existing hazardous waste facilities."). Quoting from Senator Tsongas, the court states that "the need for an emergency Federal response to deal with abandoned waste sites and chemical spills is real, and it is immediate." *Id.* Furthermore, Judge Dowd notes Senator Danforth's statement that "[w]e have no time to lose . . . I believe the clear consensus is that we must cleanup abandoned hazardous dump sites as soon as possible." *Id.*

32. *Id.* at 1313-14. Judge Dowd also concluded that the liability provisions of CERCLA may be applied retroactively to transporters. *See id.* at 1314.

33. 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). According to the initial findings of fact in the case, Northeastern Pharmaceutical's president and vice-president "[k]new [the company's] manufacturing process produced by products that contained toxic substances, including dioxin, that could be harmful to human health." *Id.* at 833. In July 1971, a plant supervisor put drums containing hazardous wastes in a trench on the Denny farm. *See id.* In 1979, the EPA received an anonymous tip that waste materials had been disposed at the Denny farm. *See id.* The court stated that

> [b]ecause of the region's soil conditions, there was a substantial likelihood of the hazardous wastes in the Denny farm site entering the environment and going into the ground farm site entering the environment and going into the ground water system; whereupon, the contaminants may have come into contact with members of the public who may have been adversely affected by their exposure to these wastes.

Id.

34. 42 U.S.C. § 9604 (granting the federal officials general authority to respond to hazardous waste pollution by cleaning up the source and lessening its effects).

35. 42 U.S.C. § 9606. This section provides for abatement actions:

> (a) Maintenance, jurisdiction, etc.
>
> In addition to any other action taken by a State or local government, when the President determines that there may be imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public I interest and the equities of the case may require. The President may also,

to apply retroactively.[37] Equally important, the court recognized that "Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites."[38]

In its analysis of section 107, the *Northeastern Pharmaceutical* court relied on *Usery v. Turner Elkhorn Mining Co.*[39] In *Usery*, the Supreme Court ruled that general retroactive liability is constitutional.[40] Following the *Usery* case, "CERCLA's imposition of liability for past acts is rational and satisfies the Due Process Clause of the Fifth Amendment."[41]

Although the *Northeastern Pharmaceutical* court ruled that Sections 104, 106(a), and 107(a) applied retroactively, it also ruled that those sections did not apply retroactively to response costs incurred before December 11, 1980.[42] The court's conclusion was based on the absence of explicit statutory language that would make the defendants liable for pre-CERCLA costs.[43] This decision was reversed on appeal in 1986.[44] During the period between the initial hearing of

---

> after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Id.

36. *See supra* note 28 (discussing CERCLA's liability provision).

37. *See Northeastern Pharmecuetical*, 579 F. Supp. at 839 ("There can be little doubt that sections 104 and 107(a) were intended to apply retroactively."); *see also Georgeoff*, 562 F. Supp. at 1302-12; *Waste Indus.*, 556 F. Supp. at 1316-17; *Wade*, 546 F. Supp. at 792-93; *Stepan Chem. Co.*, 544 F. Supp. at 1140-41. In *Northeastern Pharmecuetical*, the court states that "section 106(a) applies to inactive sites and that the same persons listed as liable under section 107(a) are liable under section 106(a) . . . [t]o read sections 104, 106(a), and 107(a) otherwise would be to emasculate the purpose of CERCLA and the intent of Congress." 579 F. Supp. at 839.

38. 579 F. Supp. at 840 (citing 126 CONG. REC. S14962-963 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph); *id.* at S14966 (remarks of Sen. Stafford); *id.* at S14972 (remarks of Sen. Tsongas); 126 CONG. REC. H11799 (daily ed. Dec 3, 1980) (remarks of Rep. Jeffords)).

39. 428 U.S. 1 (1976) (deciding black lung benefit provisions of Coal Mine Health and Safety Act of 1969 were constitutionally sound).

40. *See* 428 U.S. at 16 ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."). The court reasoned that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18.

41. 579 F. Supp. at 841 ("Congress rationally considered the imposition of liability for the effects of past disposal practices as a means to spread the costs of cleanup on those who created and profited from the waste disposal-generators, transporters, and disposal site owners/operators."). *See also Georgeoff*, 562 F. Supp. at 1312; S. Rep. No. 848, at 33-34 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

42. *See* 579 F. Supp. at 841. Other cases agreeing that response costs incurred before CERCLA enactment were unrecoverable include *United States v. Morton-Thiokol, Inc.*, No. 83-4787 (D.N.J. July 2, 1984), and *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982) (*Wade I*).

43. *See* 579 F. Supp. at 843 ("It is difficult to believe that if Congress had intended to make the defendants liable for pre-CERCLA expenses, it would not have said so explicitly and clearly in the statutory language, committee reports, or floor debates.").

44. *See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986).

Northeastern Pharmaceutical and its appeal, other cases addressed similar questions of retroactive liability.[45] The most important case decided in this period was *United States v. Shell Oil Co.*[46]

In *Shell Oil*, the district court addressed two issues regarding the retroactive application of CERCLA. First, pursuant to CERCLA are parties liable for pre-enactment actions?[47] Second, does CERCLA hold responsible parties liable for pre-enactment government incurred response costs?[48] In response to the first issue, Judge Carrigan pointed to other court decisions where liability was imposed on responsible parties for acts committed before CERCLA's enactment.[49] As for the second issue, Judge Carrigan drew his own conclusion based on the retroactive nature of CERCLA and the act's legislative history, finding that responsible parties are liable for pre-enactment government response costs.[50]

Judge Carrigan examined both statutory provisions[51] and legislative history to support his conclusions.[52] Thus, the court in *Shell*

---

45. *See* Jones v. Inmont Corp., 584 F. Supp. 1425, 1428 (N.D. Ohio 1984) ("Past generators of hazardous wastes are responsible parties under [the liability] provision."); United States v. Onatti & Goss, 630 F. Supp. 1361 (D.N.H. 1985) (holding that the retroactive application of CERCLA Sections 106-107 does not violate the Constitution).

46. 605 F. Supp. 1064 (D. Colo. 1985). *Shell Oil* addressed the disposal of wastes at the Rocky Mountain Arsenal owned by the United States. *See id.* The Army used the Arsenal for "manufacture, testing, demilitarization, disposal, and other handling of various chemical agents and munitions." *Id.* The United States has leased property to Shell since 1947 for the "manufacture, packaging, and other handling of pesticides, herbicides, and other chemicals." *Id.* at 1067. Both the Army's wastes and all of some portion of Shell's wastes were disposed of through a common system. *See id.* When the waste disposal systems failed, it released into the environment "hazardous substances comprised of co-mingled wastes generated by the Army, Shell, and other Arsenal tenants. The released chemicals have killed migratory and other birds, fish and wildlife, have contaminated air, land, groundwater, lakes, and other surface waters within the Arsenal, and have contaminated or threaten to contaminate the environment outside the Arsenal." *Id.* By administrative order in 1975, the State of Colorado instructed the Army and Shell to stop the discharge of specific chemicals and cleanup the sources of specific chemicals. *See id.*

47. *See id.* at 1072.

48. *See id.*

49. *See id.* Those cases to which Judge Carrigan refers are the following: United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. February 23, 1984), *aff'd in part*, United States v. Monsanto, 858 F.2d 100 (4th Cir. 1988); United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984); United States v. Northeastern Pharm. & Chem. Co. 579 F. Supp. 823 (W.D. Mo. 1884); United States v. A.&F. Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983); Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983); United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D.Minn. 1982); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982).

50. *See Shell Oil*, 605 F. Supp. at 1073 ("I conclude that the unavoidably retroactive nature of CERCLA, and Congress' decision in CERCLA to impose the cost of cleaning up hazardous waste sites on the responsible parties rather than on taxpayers, strongly indicate Congressional intent to hold responsible parties liable for pre-enactment government response costs.").

51. *See id.* at 1073-77. Because this case is often cited, the reasoning behind Judge Carrigan's conclusion is extremely important. Judge Carrigan discusses both the government and

Shell's arguments. First, Shell argued that the use of "shall" in § 107(a)(4) that any person who accepts shall be liable implies intent of prospective application of the liability provision. *See id.* at 1073. The government responded by arguing that all other verbs in section 107(a) are in the past tense. *See id.* at 1073. Judge Carrigan concluded the "congressional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be divined from the verb tenses in § 107(a)." *Id.*

Second, Shell contended that, if costs are to be recoverable, response and remedial actions must be compatible with the revised NCP (National Contingency Plan). *See id.* at 1074. In response, the government argued that in the definition section 101(31) of CERCLA, NCP refers to both the original and revised NCP. *See id.* Thus, the government claimed, recovery would not be limited to post-CERCLA response costs. *See id.* Judge Carrigan concludes that the "NCP consistency requirement does not preclude recovery of costs incurred before CERCLA's enactment." *Id.* at 1075.

Third, *Shell* noted that section 302(a) states "[u]nless otherwise provided, all provisions of this Act shall be effective on the date of enactment of this Act." *Id.* The government asserted that this date simply provides the date when an action can first be brought and time begins for issuing regulations. *See id.* at 1064. Judge Carrigan agreed and "[did] not interpret § 302(a) to limit liability for response costs to those incurred after December 11, 1980." *Id.* Furthermore, the government argued, while § 107(a) does not specifically address time limits for recovery for incurred costs, §§ 107(f) and 111(d) provide specific time limits on recovery for pre-enactment natural resource damages. *See id.* Thus, if Congress had wanted to restrain the recovery for pre-enactment response costs, it would have explicitly stated so. *See id.* Judge Carrigan concluded, "Section 107(f) provides that there may be no recovery for damage to natural resources occurring wholly before enactment . . . Accordingly, one must conclude that funds so spent before enactment are recoverable." *Id.* at 1076.

After examining the arguments, Judge Carrigan offered this reasoning for his conclusion:

> Construing section 107(a) to preclude recovery of pre-enactment response costs would carve out an exception to the general retroactive scheme of the statute for those most severe situations where as here, the government's response commenced prior to enactment of the statute. I cannot believe that Congress could have intended to protect the public by imposing liability on the responsible parties, yet except the sites where response had already commenced because the situations were the most imminently threatening. Such an interpretation would penalize the government for prompt response and provide and undeserved windfall to the parties who had created, then abandoned, some of the most egregious sites. I decline to presume that Congress intended this irrational result.
>
> Thus, I conclude from the statute's explicit limitation on recovery of certain natural resource damages, and its failure to limit retroactive recovery of response costs, that CERCA authorizes recovery of response costs, whether incurred before or after its enactment. I hold that Congress, in CERCLA, has overridden the presumption against retroactive application of statutes. The legislative history fully supports this conclusion.

Id. at 1076-77.

52. *See id.* at 1077-79. Again, Judge Carrigan lays out Shell's argument. First, Shell highlighted the deletion of Section 3072, a provision that authorized the recovery of pre-enactment response costs, from H.R. 7020. *See id.* at 1077 ("Section 3072 of H.R. 7020, 96th Cong., 2d Sess. (1980) (as introduced) provided: 'The provisions of this subpart and subpart C shall apply to releases of hazardous waste without regard to whether or not such releases occurred before, or occur on or after, the date of the enactment of the Hazardous Waste Containment Act of 1980.'"). Judge Carrigan asserts that this provision "applied to liability for response costs without distinguishing between costs incurred before and after enactment; the provision addressed only the time when the releases occurred. . . . There is accordingly no reason to read the deletion as evidence of intent to preclude recovery of pre-CERCLA response costs." *Id.*

Next, Shell claimed that the deletion of § 4(n) from the enacted compromise bill shows Congress' intent not to authorize recovery for pre-response costs. The pertinent portion of this section (from S. 1480, as introduced), as cited by Judge Carrigan, read as follows:

Oil was the first to rule that pre-enactment incurred government response costs were recoverable under CERCLA. On appeal, the circuit court in *Northeastern Pharmaceutical*[53] adopted the reasoning applied by the *Shell Oil* court when it held that "the district court erred in finding that CERCLA does not authorize recovery of pre-enactment response costs."[54] This effectively reversed the judgment that pre-enactment response costs were not recoverable.

C. The Reauthorization of CERCLA and its Aftermath

While courts were grappling with the issue of retroactive liability, Congress began to consider reauthorizing CERCLA. Congress realized that the problems created by abandoned and inactive waste sites were worse than originally anticipated.[55] CERCLA allotted only $1.6 billion for the Superfund,[56] and Congress recognized that this amount would be insufficient to fund the enormous cleanup that

---

> (n)(1) No person (including the United States, the Fund, or any State) may recover under the authority of this section, nor may any money in the Fund be used under Section 6 of this Act for the payment of any claim, for damages specified under subsection (a)(2)(A), (B), (C),(D),(G), or (E) (other than for loss resulting from personal injury) of this section, nor may any money in the Fund be used under section 6(a) (1) (E) or (F) of this Act, where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

Id. at 1078. Judge Carrigan determined that Shell's interpretation of the § 4(n) was wrong. He asserted that the time limitations imposed by § 4(n) were included in CERCLA as the §§ 107(f) and 111(d) restrictions of natural resource damages. *See id.* at 1079. Therefore, he states, "the scheme of § 4(n) in limiting recovery for pre-enactment damages, but not response costs, was maintained in the final statute. The legislative history of § 4(n), including the comments emphasizing that recovery of removal costs is not to be limited by retroactivity concerns, therefore applies to the statute as passed." *Id.*

After reviewing Shell's arguments, Judge Carrigan states his reasoning for his conclusion that CERCLA authorizes recovery of pre-enactment response costs.

> I conclude that the whole purpose and scheme of CERCLA is retrospective and remedial. Where Congress has intended a liability provision to have only prospective operation, as in the case of natural resource damages, Congress has so stated explicitly. (Sections 107(f) and 111(d), 42 U.S.C. §§ 9607(f) and 9611(d).) Congress did not explicitly limit or deny liability for response costs incurred before enactment. Consistent with the statutory scheme, I conclude that CERCLA authorizes recovery of pre-enactment response costs.

Id.

53. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

54 *Id.* at 737.

55. *See Amending and Extending the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Hearings before the Comm. on Env't and Public Works*, 98th Cong., 2d Sess. 2 (1984) (statement of Sen. Randolph) ("We have gained . . . a fuller appreciation of the dangers to our citizens and communities by hazardous substances . . . Early in the implementation of Superfund, it became apparent that the problem was more widespread than even the members of the committee had realized."); *id.* at 16 (statement of Sen. Bradley) ("We now know that the magnitude of hazardous waste problems is even larger than we earlier feared.").

56. 42 U.S.C.A. § 9611 (1982).

was needed.[57] Congress decided that the program needed to continue,[58] but how much the Superfund increase would be and who would pay for such an increase was still undetermined.[59] Thus, several bills were presented to amend CERCLA.[60]

The taxing authority of the Superfund expired in September 1985.[61] Congress realized that timely passage of legislation was needed if necessary cleanups were to continue.[62] However, because

---

57. *See supra* note 55, at 2 (statement of Sen. Randolph) ("This 5-year program, with the authorization of $1.6 billion is inadequate."); *id.* at 10 (statement of Sen. Bradley) ("The $1.6 billion currently available is clearly insufficient to make a significant dent in the task of cleaning up these dump sites.").

58. *See supra* note 55, at 1-1252. This collection of eight hearings before the Committee on Environment and Public Works addresses numerous issues pertaining to Superfund Reform. For example, the committee heard testimony on the health effects of Hazardous wastes on the April 11, 1984 hearing. *See id.* at 1-60. For the May 24, 1984 hearing, see *id.* at 657-900. Issues such as citizen participation were generally addressed at the May 16, 1984 hearing. *See id.* at 167-341.

59. *See supra* note 55, at 130-37 (testimony of Norman Nosenchuck, Director, Div. of Solid/Hazardous Waste, Dept. of Envtl. Conservation) (addressing the cost of cleanup per site in New York); *id.* at 161-66 (testimony of Charles Wilhelm and the position paper of the Association of State and Territorial Solid Waste Management Officials) ("The amount of the Fund should be increased to at least $9 billion . . . ."); *id.* at 241-59 (statement of Vance Hughes, Legislative Director of Clean Water Action Project) ("We recommend that the Senate adopt a non-expiring fund concept . . . We believe that it will be necessary for the fund to 'collect' $15 billion over the next five years."); *id.* at 287-335 (testimony of Jane L. Bloom, National Resources Defense Council) ("[T]he size of the Fund must be increased to at least $9 billion over 5 years and preferably to $2.4 billion per year as long as the job takes."); *id.* at 369-98 (discussing support of the Superfund through "waste end" taxes as opposed to feedstock taxes). The question of liability was largely addressed at the July 31, 1984 hearing. *See id.* at 947-1146.

60. *See* S.51, 99th Cong. (1985), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, at 413-54 [hereinafter SARA LEGISLATIVE HISTORY]. The Superfund Improvement Act of 1985 was a bill to extend and amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes. This bill was initially introduced on January 3, 1985, and it reauthorized the Superfund to $7.5 billion. *See* 131 CONG. REC. S11995-S12034 (Sept. 14, 1985). The language of S.51 was inserted into H.R. 2500 since all tax bills must originate in the House. *See* 131 CONG. REC. S12158-S12168, S12184-S12209 (Sept 26, 1985). *See also* H.R. 2817, 99th Cong. (1985), *reprinted in* 3 SARA LEGISLATIVE HISTORY, at 1540-1677; 131 CONG. REC. 16573-75 (June 20, 1985); *id.* at 1535-39 (introducing J.R. 2817); H.R. 3852, 99th Cong. (1985), *reprinted in* 5 SARA LEGISLATIVE HISTORY, at 3567-4017; H.R.Res No. 331, 99th Cong. (1985); *id.* at 4019-22 (proposing H.R. 3852 as an amendment in the nature of a substitute); 131 CONG. REC. H11547-65 (Dec. 10, 1985), *id.* at 4269-4301 (passing the bill, which authorized $10 billion for the Superfund); *id.* at H11595, *reprinted in* 5 SARA LEGISLATIVE HISTORY, at 4356 (inserting the text of H.R. 2817 in the place of the Senate-passed H.R. 2005).

61. *See supra* note 3, at 94 Stat. 2797 ("The taxes imposed by this section shall not apply after September 30, 1985. . . .").

62. *See* 131 CONG. REC. (Jan 3, 1985) (statement of Sen. Lautenberg)

> [I]t is vital that the Congress take up consideration of the Superfund program as soon as possible. The Superfund program expires in September. It is imperative that Superfund be reauthorized with sufficient lead time so that the Environmental Protection Agency can gear up to run as expanded and accelerated program.

Id.

it had not come to an agreement on reauthorization, Congress passed a two month, $150 million extension to allow the cleanups to continue.[63] A second loan providing $48 million was passed in August 1986.[64]

A congressional committee began meeting in February and continued to meet until the bill was passed in both the Senate and House.[65] Finally, on October 17, 1986, approximately one year past the expiration of the Superfund taxing authority, President Reagan signed the act, thereby amending CERCLA and establishing the Superfund Amendments and Reauthorization Act (SARA).[66]

SARA greatly impacted several components of CERCLA.[67] Had Congress been dissatisfied with the application of retroactivity under

---

63. *See* H.J. Res. 573, 99th Cong. (1986), *reprinted in* 7 SARA LEGISLATIVE HISTORY, at 5402-5403. Passed on March 20, 1986, this extension provided a loan from the general fund. *See* Letters from Lee M. Thomas, EPA administrator, to Rep. John D. Dingell & Sen. Robert T. Stafford (Sept. 22, 1986), *reprinted in* 132 CONG. REC. H9627 (daily ed. October 8, 1986). The EPA Administrator, Lee Thomas, had informed Congress that if the EPA did not receive new funding by April 1, he would have to shut down the Superfund program. *See id.*

64. *See* H.J. Res. 713, 99th Cong., 2d Sess. (1986), *reprinted in* 7 SARA LEGISLATIVE HISTORY, at 5411-5412.

65. *See* 132 CONG. REC. H9032 (daily ed. Oct. 3, 1986), *reprinted in* 6 SARA LEGISLATIVE HISTORY 4817; *see* H.R. Conf. Rep. 962, 99th Cong. (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, *reprinted in* 6 SARA LEGISLATIVE HISTORY, at 4818; 132 CONG. REC. S14,943 (daily ed. Oct. 3, 1986), *reprinted in* 6 SARA LEGISLATIVE HISTORY, at 5243. The bill passed the Senate the same day it was reported. *See* 132 CONG. REC. H9634 (daily ed. Oct. 8, 1986), *reprinted in* 6 SARA LEGISLATIVE HISTORY, at 5386-87. The House passed the bill on October 8. *See id.*

66. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

67. *See* David J. Hayes & Conrad B. MacKerron, *Superfund II: A New Mandate, A BNA Special Report*, 17 Env't Rep. 1, 128 (BNA) (Feb. 13, 1987). ("The 1986 Superfund Amendments have dealt with many different problems that arose under the first five years of the program by generally increasing the government's authority to control the cleanup process and providing a greatly increased, stable source of funding."). SARA increased the Superfund to $8.5 billion over five years for the Environmental Protection Agency and other federal agencies to cleanup abandoned and inoperative waste sites. *See id.* at 1. "The 8.5 billion for the hazardous waste cleanup program will be raised through a new $2.5 billion broad based tax on business income and a sharply increased tax on petroleum . . . ." *Id.* at 2. SARA also added numerous revisions:

> The revisions add strict cleanup standards strongly favoring permanent remedies at waste sites, stronger EPA control over the process of reaching settlement with parties responsible for waste sites, a mandatory schedule for initiation of cleanup work and studies, individual assessments of the potential threat to human health posed by each waste site, and increased state and public involvement in the cleanup decision-making process, including the right of citizens to file lawsuits for violations of the law.

Id. at 1.

In the summary of key changes to statue, the authors that SARA had the following effect:

> [T]he Act recodified the liability concepts included in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. In particular, Congress has validated the principles of strict, joint, and several liability for responsible parties. The Department of Justice persuaded Congress that these principles, which hold each responsible party potentially liable for the full cost of a cleanup, provide the necessary legal 'club' to induce parties to enter into cleanup settlements with the government. Congress did not explicitly incorporate these

CERCLA, this issue would have been addressed through the reauthorization. However, Congress did not restrict retroactive liability in SARA.[68] Thus, after CERCLA was amended in 1986, numerous cases continued to hold that CERCLA imposed retroactive liability.[69] Moreover, some commentators claim that CERCLA, with its imposition of retroactive liability, has been successful.[70] Although the legality of retroactive liability was infrequently raised after the enactment of SARA, a discussion of retroactive liability did occur when Congress engaged in discussions of the proposed reauthorization in 1995.[71] However, discussions did not focus on whether retroactive liability *could* be imposed, but instead on whether CERCLA *should* be amended to *abolish* retroactive liability.[72] The issue appeared to be settled until 1996 when *Olin* rekindled the debate about the existence of retroactive liability.[73]

---

concepts in the language of the superfund, but it re-affirmed the applicability of strict, joint, and several liability throughout its consideration of the superfund amendments.

Id. at 19.

68. *See supra* note 67 (discussing liability under SARA).

69. *See* United States v. Montrose Chem. Corp., 835 F. Supp. 534 (C.D. Cal. 1993), *rev'd*, California V. Montrose Chem. Corp., 104 F.3d 1507 (9th Cir. 1997); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Shell Oil Co., 841 F. Supp. 962 (C.D. Cal. 1993); HRW Sys. Inc. v. Wash. Gas Light Co., 823 F. Supp. 318 (D. Md. 1993); Abbot Lab. v. Thermo Chem., Inc., 790 F. Supp. 135 (W.D. Mich. 1991); United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); Kelley v. Thomas Solvent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); Amland Properties Corp. v. ALOCA, 711 F. Supp. 784 (D.N.J. 1989); United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546 (W.D. N.Y. 1988); United States v. Mottolo, 695 F. Supp. 621 (D.N.H. 1988); United States v. Miami Drum Serv. Inc., 25 E.R.C. 1469 (S.D. Fla. 1986); United States v. Tyson, 25 E.R.C. 1897 (E.D. Pa. 1986); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986).

70. *See* Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 THE BUS. LAW. 923, 1000 (1990) ("Ten years after its enactment, and four years after its major refinement, CERCLA is working more or less as Congress intended."); *see also* William A. Montgomery Jr., *Constitutional Implications of CERCLA: Due Process Challenges to Response Costs and Retroactive Liability*, 31 WASH. U. J. URB. & CONTEMP. L. 279, 288 (1987) ("The control and cleanup of releases of hazardous substances into the environment is a legitimate governmental objective. The liability provisions of CERCLA are a rational means of attaining that end because it is fair to place liability on those who benefit from the creation of the hazardous waste."). *But see* George C. Freeman, Jr., *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 THE BUS. LAW. 215-248 (1986).

71. *See id.*

72. *See id.*

73. *See* United States v. Olin, 927 F. Supp. 1502 (S.D. Ala. 1996).

III. *UNITED STATES V. OLIN CORPORATION*

A. A Review of the District Court's Reasoning

In *Olin*, District Court Judge Hand came to a conclusion which contradicted the case history of CERCLA.[74] Judge Hand concluded "Section (a) and Section 106(a) . . . are not retroactive."[75] What started as an ordinary case to recover cleanup costs became a milestone case that shocked legal commentators across the country.[76]

Judge Hand provides a lengthy argument for his decision. First, Hand maintains that the Eleventh Circuit had not "squarely

---

74. *See id.* Olin is a Virginia corporation that owned and operated a chemical plant in McIntosh, Alabama. *See id.* at 1503. The United States alleged that the Olin plant site was actually two sites. Site 1 includes 20 acres on the southern edge of the property, on which an active chemical-production facility operates. *See id.* at 1504. This site contains a number of "solid waste-management units," both active and inactive, many of which have been closed and treated for the removal of hazardous substances. *See id.* The government claims that "in 1952 Olin Mathieson began operating a mercury-cell chloralkali plant on Site 1 which generated and released wastewater containing mercury into Site 2 until 1974. This plant ceased operating in 1982." *Id.* at 1504. Furthermore, in 1955 "Olin Mathieson built a 'crop-protection-chemicals' plant which discharged waste water into Site 2 until 1974." *Id.*

Because these two plants ran from the 1950's to late 1982, "mercury and chloroform, which are alleged to be hazardous substances under 42 U.S.C. §9601(14), were released into Site 1." *Id.* Although most of the supposed contamination occurred before December 11, 1980, the government argued that a threat of continued releases at and from Site 1 existed. *Id.* at 1506. "According to the remedial investigation report, any contaminants still at Site 1 affect groundwater there mostly by migrating through the alluvial aquifer . . . . Indeed, the record reflects that any contamination at Site 1 is of such minimal proportions as not to constitute any hazard to the public." *Id.* at 1506-07. Along with the action against Olin, the Justice department filed a proposed consent decree. *See id.* at 1505. Before it would rule on the consent decree, the court requested two briefs. The defendant additionally raised the issue of CERCLA's retroactivity, claiming that "Congress did not intend for CERCLA to be retroactive and that if it did, CERCLA violates the Due Process Clause and unconstitutionally delegates legislative power to the EPA." *Id.* at 1507. The Justice Department responded to the claims concerning retroactivity. Hence, Judge Hand examined these arguments about retroactivity to form his decision. *See id.*

75. *Id.* at 1519. Judge Hand also concluded that CERCLA violated the Commerce Clause as interpreted in *United States v. Lopez*, 514 U.S. 549 (1995).

76. *See, e.g.*, Mark D. Tucker, *"Retroactive Liability" Is Challenged*, NAT'L L.J., Oct. 14, 1996, at C1 (discussing Judge Hand's "unanticipated decision" that CERCLA could not be applied retroactively). This unusual decision brought about an impassioned response from the Department of Justice. *See, e.g., Congress Wanted CERCLA Applied Retroactively, Government Says in Brief*, 9 No. 9 MLRSF 4 (Aug. 9, 1996) ("A federal judge who found in May that CERCLA did not apply retroactively to waste cites created before its enactment seriously misinterpreted a recent Supreme Court decision on the Commerce Clause, the U.S. Department of Justice argued . . . .").

While many commentators were surprised at the decision, they generally believed that the decision would be short-lived. *See, e.g., Superfund: Retroactive Liability Decision Seen Unlikely to Survive Certain Appeal*, SOLID WASTE REP., Aug. 1, 1996, *available in* 1996 WL 8264604. According to Adam Babich of the Washington-based Environmental Law Institute, the decision could create a "short flurry of activity." *Id.* However, he believed that decision would be short lived because Judge Hand "went the other way on an issue that was settled." *Id.*

addressed" the issue of retroactive.[77] Next, although Judge Hand recognizes the multitude of federal cases that have directly addressed the issue of CERCLA's retroactivity,[78] he asserts that all of these cases were decided before the Supreme Court's decision in *Landgraf v. USI Film Prods.*[79] While Judge Hand notes that the defendants argued that *Landgraf* should be influential, he also notes that the Justice Department countered that CERCLA's retroactivity is "well-settled" and not affected by *Landgraf* because the decision "announced no new constitutional rules, and in no way impacts this case law."[80] Judge Hand concludes that *Landgraf* was significant in terms of retroactive liability.[81] He suggests that "not all the courts which have applied CERCLA to pre-enactment conduct have agreed that it is retroactive."[82]

---

77. *See* 927 F. Supp. at 1507 ("[A] panel of the Eleventh Circuit recently referred to CERCLA as being retroactive. Virginia Properties Inc. v. Home Ins. Co., 74 F. 3d 1131, 1132 (11th Cir., 1996). The issue of retroactivity, however, was not before that court.").

78. *See id.* Judge Hand recognizes the following federal cases: In the Matter of Penn. Cent., 944 F.2d 164 (3rd Cir. 1991); Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991); O'Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); HRW Sys. v. Wash. Gas, 823 F. Supp. 318 (D. Md. 1993); United States v. Kramer, 757 F. Supp. 397 (D.N.J. 1991); Philadelphia v. Stepan Chem., 748 F. Supp. 283 (E.D. Pa. 1990); Kelley v. Solvent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988); United States v. Hooker Chem. & Plastics, 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Dickerson, 640 F. Supp 448 (D. Md. 1986); United States v. Onatti, Inc. 630 F. Supp. 1361 (D.N.H. 1985); Town of Boonton v. Drew Chem., 621 F. Supp. 663 (D.N.J. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Shell Oil, 605 F. Supp. 1064 (D. Colo. 1985); Jones v. Inmont, 584 F. Supp. 1425 (S.D. Ohio 1984): United States v. S. C. Recycling Disposal Co., 653 F. Supp. 984 (D.S.C. 1984); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984); United States v. Price, 577 F. Supp 1103 (D.N.J. 1983); Ohio v. Georgeoff, 562 F. Supp. 1300 (N.D. Oh. 1983); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982).

79. 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994). *See also Olin*, 927 F. Supp. at 1507. The defendants cited Freeman George Clemon, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663 (Feb. 1995). Freeman argues that section 107(a) of CERCLA could not meet the test of the statutory construction offered in Justice Stevens' majority opinion in *Landgraf*. *See id.* at 665. Moreover, Freeman claims that neither the text of the statute nor the legislative history could support the retroactive application. *See id.*

80. 927 F. Supp. at 1508. Judge Hand cites the Plaintiffs Memorandum on the Retroactivity of CERCLA and Due Process Issues. The plaintiff maintains that "[e]very court to face CERCLA retroactivity challenges has rejected the arguments advanced here. Indeed, courts have uniformly held that (1) Congress clearly and unequivocally intended retroactive application of CERCLA; and (2) such a liability scheme is rationally related to a legitimate governmental interest." *Id.*

81. *See id.*

82. *Id.* Judge Hand cites the following cases: United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. Diamond Shamrock Corp. No. C80-1857, 1981 WL 137997, at *1 (N.D. Ohio May 29, 1981); United States v. Price, 523 F. Supp. 1055 (D.N.J 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982). *South Carolina Recycling* concluded that the act was not "retroactive," but applied CERCLA on the theory that because the previous disposal

Next, Judge Hand asserts that because *Landgraf* "addresses a rule of statutory construction,"[83] the Justice Department cannot credibly argue that '[t]he result in *Landgraf* is unremarkable.'"[84] Judge Hand suggests that the Justice Department easily dismissed *Landgraf* because the case "demolishes the interpretive premises on which prior cases had concluded CERCLA is retroactive."[85] As an example, Judge Hand proffers the finding of *Brown v. Georgeoff*.[86] While the court in *Georgeoff* recognized a historical "presumption favoring a prospective only application of a statute,"[87] Judge Hand describes how the court applied a presumption in favor of retroactivity.[88] Because *Landgraf* disapproved of the premises for the decision in *Georgeoff*, Judge Hand argues that "*Georgeoff* and the cases which rely on its analysis—and which do not do their own analysis—cannot be

---

continued to cause or threatened to cause releases after the Act's effective data. *See* 653 F. Supp. at 984.

83. *Id.*

84. *Id.*

85. *Id.* at 1508-09. Judge Hand argues that *Landgraf* destroys the interpretive premises of previous cases by "attempting to clarify confusion regarding the interpretive rules applicable to retroactivity." *Id.* at 1508. "Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provisions might apply to cases arising before enactment while others might not." *Id.* (comparing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) with *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696 (1974)). The court continues: "In reaffirming the traditional presumption against retroactive legislation, *Landgraf* disproves language in *Bradley* which had appeared to reverse that traditional presumption." *Id.* at 1508-09. *Bradley* allowed an award of attorneys' fees "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is a statutory direction or legislative history to the contrary." 416 U.S. at 711. Furthermore, the *Landgraf* court states that "[a]lthough the language suggests a categorical presumption in favor of application of all new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277.

86. Judge Hand claims that the court in *Georgeoff* "did exactly what *Landgraf* disapproves. *Georgeoff* began quite appropriately by 'initially determin[ing] the standard to be applied in determining whether a statute should be applied retroactively.'" 927 F. Supp. at 1509 (citing *Georgeoff*, 562 F. Supp. at 1306).

87. *Olin*, 927 F. Supp. at 1508.

88. *See id.* In a footnote, Judge Hand recounts the *Georgeoff* court's explanation of the presumption.

> Since the principal basis for the presumption against retroactivity is the threat of raising a constitutional issue, the reduction of that constitutional issue must necessarily reduce the need to interpret CERCLA to avoid raising that constitutional issue. *The weight of the presumption therefore being reduced*, a more lenient approach in reviewing claims that the presumption has been over-ridden may be appropriate. After *Thorpe* and *Bradley*, the presumption against retroactivity has arguably been changed to a presumption in favor of retroactivity. That presumption can only be over-ridden where there is a clear legislative directive to limit the statute to a prospective application or the change in law would cause manifest injustice to the party adversely affected.(emphasis added).

Id. at 1507, n. 9.

considered persuasive."[89] Judge Hand continues by noting that only two other cases do their own analysis of retroactivity,[90] *United States v. Shell Oil Co.*[91] and *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*,[92] and both cases approvingly refer to *Georgeoff*.[93] Furthermore, Judge Hand enumerates various problems with the reasoning in *Shell* and *Northeastern Pharmaceutical*.[94]

Yet Judge Hand recognizes that "prior to *Landgraf*, lower federal courts would have tended to minimize the importance of the

---

89. *Id.* at 1509.

90. *See id.* Judge Hand states that "the rest of the cases basically rely on one or more of these three cases and other cases which cite these cases." *Id.* at 1509.

91. 605 F. Supp. at 1064.

92. 810 F.2d 726 (8th Cir. 1986).

93. *See* 605 F. Supp. at 1072; 810 F.2d at 733.

94. *See Olin*, 927 F. Supp. at 1509. First, Judge Hand states that "neither case explains how it is applying the presumption against retroactivity; but like *Georgeoff*, both cases demonstrate little regard for the presumption." *Id.* Judge Hand recognizes that the *Shell Oil* court analyzes the statutory provisions as well as the "general scheme and purpose" of CERCLA, and the court concludes that CERCLA is "unavoidably retroactive." 605 F. Supp at 1073. Judge Hand also cites *Landgraf* stating "that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285-86. Judge Hand further criticizes the court in *Shell* because "[o]ther than its discussion of 'general purpose and scheme,' *Shell Oil* does not explain precisely what overrides the presumption against retroactivity." 927 F. Supp. at 1509. In regard to *Northeastern Pharmaceutical*, Judge Hand maintains that the case "treats the presumption itself lightly, devotes only one sentence to the statutory language, relies on *Shell Oil* and *Georgeoff* among other cases, and offers one paragraph about the statutory scheme." *Id.* at 1510. In a footnote, Judge Hand offers the discussion of the presumption by the Court in *Northeastern Pharmaceutical*:

> The district court correctly found Congress intended CERCLA to apply retroactively. (citation omitted). We acknowledge there is a presumption against the retroactive application of the statutes. *See* United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982). We hold, however, that CERCLA §302(a), is "merely a standard 'effective date' provision that indicated the date when an action can first be brought and when the time begins to run for issuing regulations and doing other future acts mandated by the statute." *United States v. Shell Oil Co.*, 605 F.Supp. 1064, 1075 (D. Colo. 1985); *cf. Von Allmen v. Conn.t Teachers Retirement Bd*, 613 F.2d 356, 359-60 (2d Cir. 1979) (veterans statute).
>
> Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect. The language used in the key liability provision, CERCLA §107, 42 U.S.C. § 9607, refers to actions in the past tense: "any persons who . . . at the time of disposal of any hazardous substances owned or operated," CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), "any person who arranged with a transporter for transport of disposal," CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and "any person who . . . accepted any hazardous substances for transport to . . . sites selected by such person," CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).
>
> Further, the statutory scheme itself is overwhelmingly remedial and retroactive. CERCLA authorizes the EPA to force responsible parties to cleanup inactive or abandoned hazardous substance sites, CERCLA § 106, 42 U.S.C. § 9606, and authorizes federal, state, and local governments and private parties to cleanup such sites and then seek recovery of their response costs from, responsible parties, CERCLA § 104, 107, 42 U.S.C. § 9604, 9607. In order to be effective, CERCLA must reach past conduct. CERCLA's backward looking focus is confirmed by the legislative history. . . .

presumption against retroactivity."[95] He concludes that *Landgraf* "does at least clarify the analysis of retroactivity and, therefore, does 'impact this case.'"[96]

Judge Hand next offers a summary of the majority opinion of *Landgraf*, stating that the opinion requires a court

> 1) to determine a) whether Congress has expressly stated the statutes reach and b) if not, whether the text and legislative history have 'clearly prescribed' Congress' intent to apply the provision retroactively; 2) if not, whether the provision actually has 'retroactive effect' on the party or parties in the litigation, and 3) if so, to apply the traditional presumption against retroactivity—absent a clear congressional intent to the contrary.[97]

In accordance with the *Landgraf* framework, Judge Hand begins by addressing the first question, "Has Congress Expressed Its Intent On CERCLA Retroactivity?"[98] The judge offers a lengthy discussion of both the statutory language[99] and legislative history[100] before

---

Id. at 1510.

95. *Id.*

96. *Id.* at 1510-11. As support for this claim that *Landgraf* has an impact on *Olin*, Judge Hand offers the following footnote: "*See also* Leonard Charles, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations*, 28 U. RICHMOND L. REV. 1363 (1994) ("Prior to *Landgraf*, the Court had utilized two conflicting presumptions regarding the retroactivity of civil legislation."). *See* Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INT. L. REV. 87 (1995); Duncan B. Hollis, *Employment Discrimination Law, Statutory Retroactivity*, 36 B.C. L. REV. 373, 385 (1995) ("Beyond the scope of the § 1981 cases, however, *Rivers*, in conjunction with *Landgraf*, does much to resolve the confusion surrounding what test a court should apply when a case implicates a statue enacted after the violative conduct occurred.").

97. 927 F. Supp. at 1511. While Judge Hand summarized the analysis, he also included major portions of the opinion. *See id.* at 1510-12.

98. *Id.* at 1512.

99. *See id.* at 1512-13. First, Judge Hand simply states, "CERCLA contains no language explicitly stating that it is retroactive." *Id.* at 1512. However, he acknowledges that *Landgraf's* "discussion of other (i.e., non-express) statutory language and legislative history establishes that these should be considered in determining congressional intent." *Id.* at 1512. Therefore, Judge Hand examines the non-express statutory language.

Because *Landgraf* instructs that answers to retroactivity issues can vary among the provisions, Judge Hand examines sections 106(a) and 107(a). First, in regard to section 106(a), Judge Hand states that "[a]though injunctive relief is ordinarily prospective, when it requires a party to spend funds related to actions taken prior to CERCLA's enactment, such relief is nevertheless retroactive. Thus to the extent that the government's claims under 106(a) and 107(a) relate to actions taken prior to the effective date of CERCLA, they involve the issue or retroactivity." *Id.* at 1512-13.

Moreover, Judge Hand maintains that the Justice Department relies only on *Northeastern Pharmaceutical's* observation, citing that "[t]he language used in the key liability provision, CERCLA § 107 . . . refers to actions and conditions in the past tense." 810 F.2d at 733. In contrast, the Court proffers the decision in *Georgeoff*.

> Despite these statutory arguments, the Court is unable to declare that the statute evidences the 'imperative character' required to overcome the presumption against retroactivity. Regardless, these provisions provide some evidence that Congress intended CERCLA to apply retroactively. The Court, therefore, will

> consider these statutory terms indicia, of a Congressional intent to allow retroactive application of CERCLA.

562 F. Supp. at 1311.

Judge Hand next states that the court in *Shell Oil* agrees with *Georgeoff's* decision that "the statutory language in CERCLA is not sufficient to establish retroactivity . . . ." *Id.* at 1513. Therefore, the Court concludes that "the language of Section 107 provides 'no clear evidence of Congressional intent,' as required by *Landgraf*, that CERCLA's liability provisions be given retroactive effect." 927 F. Supp. at 1513.

Furthermore, Judge Hand states that Section 106 "contains no language indicating congressional intent to authorize relief that is retroactive." *Id.* The Justice Department argues that, "although it reaches pre-enactment conduct, legislation designed to alleviate a continuing public nuisance does not act retroactively." 562 F. Supp. at 1304. However, *Landgraf* rules out this attempt to dodge the issue of retroactivity.

100. *See Olin*, 927 F. Supp. at 1513-16. Judge Hand initially states that "CERCLA itself has almost no legislative history." *Id.* at 1513. He relies on arguments from Frank P. Grad, *Treatise on Environmental Law* Sec. 4A.02[2][a], at 4A-51 (1994). *See id.* at 1514. Grad states, "the actual bill which became Public Law No. 96-510 had virtually no legislative history at all" and that most of CERCLA's legislative history comes from "bills introduced which contributed to some extent to the final act." *Id.*

The Court acknowledges that in *Landgraf*, it considered a previous bill as part of legislative history. More importantly, the Court in *Landgraf* strongly regarded the fact that a bill that had explicitly provided for retroactivity has been vetoed the previous year. Because the later legislation did not contain the explicit provision for retroactivity, the *Landgraf* court inferred that "it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill." *Landgraf*, 511 U.S. at 262.

Morever, Judge Hand recognizes that the court in *Georgeoff* stated, "the precise issue of retroactivity . . . was not addressed in Congressional debates." 562 F. Supp. at 1311. The Justice Department highlights that one of the differences between CERCLA and the civil rights statute examined in *Landgraf* is that no other bill before CERCLA explicitly supported retroactivity. *See* 927 F. Supp. at 1508. Judge Hand responds to this argument by stating the absence of a vetoed bill discussing retroactivity "does not strengthen the case for retroactivity. It only means that what Justice and other courts have labeled the legislative history of CERCLA may not be as clear as was the legislative history of the Civil Rights Act considered in *Landgraf*." *Id.* at 1514. In an attempt to demonstrate clear intent of CERCLA's retroactivity, the Justice Department argues that the "history, as analyzed by the courts, demonstrates unequivocally that Congress was concerned about the past, pre-enactment acts of disposal." *Id.*

However, Judge Hand dismisses the Justice Department's argument by stating the following:

> The argument of the Justice, relying as it does on past cases, fails to overcome the presumption against retroactivity because those prior cases do not follow the analysis of *Landgraf* and because they find clarity in legislative history which does not exist. Many of the past cases are unclear about two things which are distinguished in *Landgraf*: congressional intent and retroactive effect. As discussed below, *Landgraf* struggles with the term 'retroactive.' The majority excludes certain statutes from the presumption against retroactivity, specifically procedural and jurisdictional statutes.

511 U.S. at 244.

Approving of Justice Story's discussion in *Society for Propagation of the Gospel v. Wheller*, 22 F.Cas. 756 (No. 12, 156) (CCDNH 1814), the majority states that "[a] statute does not operate 'retroactively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . ." 511 U.S. at 269. In other words, the fact that legislation might have retroactive effect does not necessarily mean that Congress clearly intended it to be so applied.

concluding that both "fail to demonstrate a clear congressional intent for retroactivity."[101] Hence, following *Landgraf's* framework, a presumption against retroactive liability for CERCLA exists.[102]

Because the court ruled that no Congressional intent for CERCLA's retroactive liability existed, the court next examined the question, "Does CERCLA Have a Retroactive Effect?"[103] In the *Olin* decision, Judge Hand determined that CERCLA "certainly has 'retroactive effect' because . . . it easily falls within the explanatory language of that term."[104] Yet the *Olin* court applied *Landgraf's* decision about compensatory damages to the financial liabilities under CERCLA, ruling that the damages in this provision do not apply when there is an absence of Congressional intent.[105]

In the final step of the *Landgraf* analysis, Judge Hand asks, "Should the Presumption Against Retroactivity be Applied?"[106] In *Landgraf,* the court examined whether a particular section of an act "should govern cases arising before its enactment."[107] The *Olin* court argued that CERCLA posed the threat of punitive damages,[108] and "liability under CERCLA would require compensation for actions which when taken violated no federal or state law."[109] Based on this reasoning, the *Olin* court decided that CERCLA liability is the type of

---

101. 927 F. Supp. at 1516.

102. *See id.*

103. *Id.*

104. *Id.* The Court continues by stating that "the Justice Department's attempt in this case to impose liability under § 107(a) largely on actions occurring prior to the statute's effective date 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 1516.

105. *See id.* Judge Hand states that "[w]hat *Landgraf* said about compensatory damages can be said about the financial liabilities under CERCLA for pre-enactment conduct: [t]he new damages remedy in Sec. 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." *Id.*

106. *Id.* at 1516-19.

107. *Landgraf,* 511 U.S. at 280. The Court focuses on a particular section and then "distinguishes between a procedural provision of that section (jury trial right) which would 'presumably apply to cases . . . regardless of when the underlying conduct occurred,' and its punitive and compensatory damages provision." *Id.* at 281. While the *Landgraf* court interpreted punitive damages not to be retroactive, the court struggled with classifying the provision that authorized the recovery of compensatory damages because the "conduct itself was already unlawful—only the remedy was new. . . despite the differences between the compensatory damages provision." 927 F. Supp. at 1517.

108. *See Olin,* 927 F. Supp. at 1516. According to Judge Hand,

> "§ 106 does provide for fines for failure to comply with an executive branch abatement order; such fines are clearly punitive. Section 107(c)(3) also authorizes punitive, treble damages. The EPA uses the threat of punitive damages as a negotiating tool. Given the very real threat of punitive damages, CERCLA retroactivity poses very nearly the same 'ex post facto' danger referred to in *Landgraf.*"

Id. at 1517. "According to *Landgraf,* a provision for punitive damages should not be construed as retroactive unless the language forces that conclusion." *Id.* at 1517.

109. *Id.* at 1516.

liability that "does not apply retroactively without clear congressional intent."[110]

Judge Hand's *Olin* decision continued by criticizing the Justice Department's reliance on *Northeastern Pharmaceutical*, a case that characterizes CERCLA as "overwhelmingly remedial and retroactive" and as having a "backward focus."[111] He suggests that legislation "cannot be remedial if the conduct being 'remedied' was lawful at the time of its occurrence,"[112] and asserts that the "backward focus" of CERCLA is not persuasive.[113] Finally, Judge Hand asserts that the Justice Department's argument "boils down to a claim that CERCLA must be read to be retroactive," and he presents an argument against the Justice Department's claim.[114]

Judge Hand ultimately concludes that neither the Justice Department nor the pre-*Landgraf* cases established that Section 107(a) is "the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective."[115] Therefore, the court ruled that "Section 107(a) and Section 106(a) as linked to it in this case are not retroactive."[116]

---

110. *Id.* The court in *Olin* stated "even on the compensatory damages issue, *Landgraf* says, 'it is the kind of provision that does not apply in the absence of clear congressional intent.' Certainly, under *Landgraf* principles, CERCLA liability is the kind that does not apply retroactively without clear congressional intent." *Id.* at 1517.

111. *Id.*

112. *Id.* at 1518.

113. *See id.* First, the court cites *Landgraf*, stating that "compensatory damages are quintessentially backward-looking. Compensatory damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not 'compensate' by distributing fund from the public differs, but by requiring particular employers to pay for harms they caused." *Id.* Second, the court again cites *Landgraf*, stating that the fact that "retroactive application of [this] statute would its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity." *Id.* at 1518 (citing 511 U.S. at 285-86).

114. The court claims that only one sentence, in isolation, provides support for the Justice Department's argument. "Section 102 is plainly not the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective.' *Id.* at 1518. Judge Hand further acknowledges that Congress addresses present as well as future problems. *See id.* However, the court makes the following argument:

> It does not follow . . . that the liability provision 'must be interpreted to be retroactively because a contrary reading would render it ineffective.' The Court continues by stating that in regard to pre-enactment releases. "the purpose of CERCLA can be covered through the Superfund. The EPA, however, has chosen to recover as much as possible from private parties, no doubt in part due to Congress' failure to provide sufficient resources to pay for cleaning all the sites, even as the need was thought to be in 1980. *See Georgeoff*, 562 F.Supp. at 1312-13. While *Georgeoff* takes the lack of funding as an indication of congressional intent to make CERCLA retroactive, lack of funding does not render the operation of the statute itself ineffective in the sense used in *Landgraf*.

Id.

115. 927 F. Supp. at 1519.

116. *Id.*

B. *Other Courts' Reactions to the* Olin *Reasoning*

Several questionable aspects regarding *Olin's* reasoning existed. First, the analogy between *Landgraf* and *Olin* was questionable. While *Olin* addressed retroactivity pertaining to hazardous waste damage, *Landgraf* examined retroactivity pertaining to civil rights.[117] Most importantly, the damaging effects in each situation are quite different. In *Olin*, the effects of the past action are still harmful to those individuals who live near the areas of abandoned waste sites. In contrast, in the civil rights case, *Landgraf*, the effects of the action would probably have been more damaging in the past. Thus, one important difference between *Landgraf* and *Olin* is that the effects of the damages of the past action is more presently harmful in cases involving environmental waste.[118]

Furthermore, Congress reauthorized CERCLA twice and did not attempt to change the liability provisions, even though many cases had arisen questioning retroactive liability.[119] While Congress had the opportunity to change the liability provisions both in 1986 and 1990, they did not implement any changes because the matter seemed to be settled.[120] Since Congress did not take steps to change the court's interpretation imposing retroactive liability implied that the court's imposition of such liability was in fact consistent with the Congressional intent.

While waiting for the appeal, several cases highlighted deficiencies in Judge Hand's argument. In *Nevada v. United States and Atlantic Richfield Co.*,[121] Judge Hagen, in applying the *Landgraf* framework, concluded that Congress "clearly intended CERCLA to reach backward and impose liability upon those who are responsible for ongoing environmental deterioration resulting from wastes which had been dumped in the past."[122]

In reaching this decision, Judge Hagen first noted that instead of setting forth a new rule of law regarding retroactivity, *Landgraf* simply clarified that earlier decisions "did not erode the traditional presumption against retroactivity."[123] Moreover, Judge Hagen

---

117. *See id.* at 1502; *Landgraf*, 511 U.S. at 244.

118. *See id.*

119. *See supra* notes 33-54, and accompanying text for a discussion of cases decided before the reauthorization of CERCLA.

120. *See id.*

121. 925 F. Supp. 691 (D.Nev. 1996).

122. *Id.* at 704 (citing *Shell Oil*, 605 F. Supp. at 1072).

123. *Id.* at 693. The earlier cases that the court refers to include *Bradley v. Richmond School Board*, 416 U.S. 696 (1969) (authorizing application of statutory attorney's fees provision to a prevailing party in litigation commenced before the provision's effective date) and *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268 (1969) (authorizing application of a regulation requiring

stated that *Landgraf* requires "clear evidence of Congressional intent" as opposed to a "clear statement of Congressional intent."[124] Judge Hagen next determined that the "negative implication analysis set forth in *United States v. Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985) . . . is far more persuasive in the CERCLA case than it was in the *Landgraf* case."[125] Judge claimed that "it is clear that the entire scheme of the statute contemplates retroactive liability for response costs, but not for natural resource damages."[126] However, *Shell Oil* does not discuss the distinction of natural resource damages.[127]

Judge Hagen further ruled that the *Shell Oil* court "clearly applied the presumption and found it outweighed by overwhelming evidence of congressional intent on retroactivity."[128] Finally, Judge Hagen concluded that "the clear intent of Congress was to provide for retroactive application of the CERCLA liability provision."[129]

---

local housing authority to give pre-eviction notice of reasons and opportunity to an eviction commenced before issuance of the regulation). *See Landgraf*, 511 U.S. at 276-80.

124. 925 F. Supp. at 693.

125. *Id.* at 694 ("Congress implicitly authorized retroactive application of the third category of liability, damages to natural resources, section 107(a)(4)(C).") (quoting *Shell Oil*, 605 F. Supp at 1076)). In contrast, *Olin* does not specifically address this section of *Shell*.

126. *Id.* at 695 ("[T]he distinction between retroactive damages liability and retroactive response cost liability was maintained in the final version of CERCLA as the §§ 107(f) and 111(d) limitations on recovery of natural resource damages.").

127. *See generally Shell Oil*, 605 F. Supp at 1064-86.

128. *Atlantic Richfield*, 925 F. Supp at 695 (citing *Shell Oil*, 605 F. Supp. at 1064, 1069, 1076-77).

129. *Id.* As support for this conclusion, Judge Hagen offered the following footnote:

> *See, e.g.*, Colloquy between Senators Stafford and Hart in Senate Debate on S. 1480, Nov. 24, 1980 (noting term "hazardous substances" in S. 1480 will cover existing abandoned radium-contaminated sites in Colorado); Remarks of Rep. Vento in House Debate on S. 1480, Dec. 3, 1980 (noting bill is designed in part "to cleanup our environment from past improperly disposed of hazardous wastes;" delay in passage of bill will "prolong the overall danger"); Remarks of Rep. Fisher in House Debate on S. 1480, Dec. 3, 1980 (noting bill will deal with "problems of toxic waste disposed of years ago"); Remarks of Rep. Martin in House Debate on S. 1480, Dec. 3, 1980 ("[A]bandoned orphaned collection of unlabeled crud . . . will not clear themselves up"); Remarks of Rep. Lent in House Debate on S. 1480, Dec. 3, 1980 (noting RCRA contains a gap "respecting the past disposal of chemical wastes . . . it is necessary to enact legislation to assist in the cleaning of these sites"); Remarks of Rep. LaFalce in House Debate on S.1480, Dec. 3, 1980 (noting bill "deal[s] with the problem of abandoned waste sites"); Remarks of Rep. Gore in House Debate on S. 1480, Dec 3, 1980 (pointing out that 3000 abandoned hazardous chemical waste sites in the U.S. "need to be dealt with"); Remarks of Rep. Brown in House Debate on S. 1480, Dec. 3, 1980 (establishing that in contrast to other environmental legislation, this bill deals with "who pays for cleaning up the environmental mess we have created"); Statement of Sen. Muskie ("Our present laws are not enough . . . We must correct those omissions in the law having to do with past hazardous waste disposal methods."); Letter, September 25, 1979, from Douglas M. Costle, Admin.,U.S.E.P.A., to Jennings Randolph, Chairman, Senate Committee on Environment and Public Works, *reprinted in* S. Rep. No. 96-848, July 11, 1980 (providing for response at "abandoned and inactive' sites; bill "would establish liability for costs expended by the government to cleanup past disposal

Judge Hagen did not comment on the *Olin* decision itself because that case had not yet been published at the time Judge Hagen made his ruling.

However, other courts did specifically find the *Olin* decision flawed. On July 15, 1996, the *Gould Inc. v. Battery & Tire Serv.*[130] court rejected the *Olin* decision,[131] and on August 22, 1996, the *United States v. Alcan Corp.*[132] court offered a one-sentence order that rejected the defendant's arguments that relied on *Olin*.[133] Finally, on September 27, 1996, in *United States v. Rohm and Haas Co.*,[134] the court disagreed with *Olin* by ruling that Congress intended CERCLA to be applied retroactively.[135] These decisions underscore that courts should not follow in the footsteps of *Olin*, but instead should follow the well-established precedent that CERCLA is retroactive. The

---

practices that today are threatening public health and the environment"; liability provisions are not retroactive because "they merely codify longstanding common law rules relating to liability for hazardous products and undertakings"); S. Rep. No. 96-848, July 11, 1980, additional Views of Senators Domenici, Bentsen, and Baker ("S. 1480 . . . substantially chang(es) existing common law (in some cases retroactively")).

Id. at 695 n.8.

130. 933 F. Supp. 431 (M.D. Pa. 1996).

131. *See id.* at 438. The Court came to the following conclusion:

> [*Olin*] is the only Court to date to hold that CERCLA does not apply retroactively. Several courts, including the Third Circuit, have addressed the issue of CERCLA's retroactivity. *See In the Matter of Penn Central*, 944 F.2d 164 (3rd Cir. 1991). Furthermore, all of the cases this Court has cited in rejecting Defendants liability arguments have applied CERCLA retroactively without formally ruling on the issue. Accordingly, we are unpersuaded by a single Alabama District Court case which is surrounded by a myriad of opinions that apply CERCLA retroactively, either directly or implicitly. Thus, we will reject Defendants arguments on retroactivity grounds.

Id.

132. 96 F.3d 1434 (3d. Cir. 1996), *cert. denied*, 117 S. Ct. 2479 (1997).

133. *1 Federal Court Upholds Retroactive Application of Superfund; Holds Alcan Corp Liable for 1985 Oil Slick*, DOJ NEWS RELEASE, *available in* 1996 WL 481778.

134. 790 F. Supp. 1255 (E.D. Pa. 1992).

135. *See id.* This case examined several factors similarly to *Olin*. *See id.* First, the Court found that CERCLA's express language supports a finding of clear congressional intent to apply CERCLA retroactively. *See id.* The Court specifically found persuasive the past tense language used in 42 U.S.C. § 9607(a)(2), (a)(3), and (a)(4). Next, the court made the following ruling:

> The legislative history of CERCLA supports a finding that Congress intended CERCLA to apply retroactively. The fact that inactive sites are discussed separately from new sites and the fact that inactive sites are discussed first suggests to this Court 1) that the existence of inactive sites such as Love Canal prompted Congress to pass CERCLA, and 2) that CERCLA was intended to impose liability on those parties responsible for such inactive sites. To effectuate this result, CERCLA must be applied retroactively. To find otherwise would be to ignore a significant portion of the legislative history of the Act. Moreover, a contrary finding would frustrate the primary purpose of the Act.

Id.

Eleventh Circuit agreed with these other courts when it reversed the *Olin* decision.

C. *The* Olin *Appeal*

On March 25, 1997, the 11th Circuit reversed the *Olin* decision.[136] In *Olin II*, the court flatly rejected the conclusion that *Lopez* altered the constitutional standard for federal statutes regulating intrastate activities.[137] In reaching this decision, the *Olin II* court first categorized the activity at issue. Rejecting the government's argument,[138] the court determined that the issue was "disposal of hazardous waste at the site of production."[139] In determining that this issue affected interstate commerce, the court relied on a Senate committee report, which cited improper on-site waste disposal as a significant factor in chemical contamination in agriculture losses and the *Lopez* decision.[140]

Following *Landgraf*, the *Olin II* court also reviewed CERCLA's language, structure, purpose, and legislative history to determine if retroactive liability applies. Based on its analysis, the *Olin II* court concluded that the district court mistakenly found no insight into Congress' intent.[141] The *Olin II* court made this determination based on legislative history, which "confirms that Congress intended to impose retroactive liability for cleanup.[142] This decision supports the Eleventh Circuit's implicit holding of retroactive liability found in several cases, including *Redwing Carriers v. Saraland Apartment*,[143] *Florida Power & Light Co. v. Allis Chalmers Corp.*,[144] and *South Florida Water Management District v. Montalvo*.[145] In each of these cases, the

---

136. 107 F.3d 1506 (1997) [hereinafter *Olin II*].

137. *See id.* at 1510 ("[A]lthough Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."). *Id.*

138. *See id.* The government argued that the issue was "releases of hazardous substances generally." *Id.*

139. *Id.*

140. *See id.* at 1510-11. The court only references *Lopez* when concluding that "the regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress' broader scheme to protect interstate commerce and industries thereof from pollution." *Id.* at 1511.

141. *See id.* at 1514.

142. *Id.*

143. 94 F.3d 1489 (11th Cir. 1996) (holding against original property owner already held responsible for cleanup costs under CERCLA in action against general and limited partners of current owner).

144. 85 F.3d 1514 (11th Cir. 1996) (deciding that the district court was correct in granting summary judgement in favor of manufacturers who were sued under CERCLA by buyer because electrical transformers contained polychlorinated biphenyls (PCBs)).

145. 84 F.3d 402 (11th Cir. 1996) (concluding that landowners who contracted for pesticide aerial spraying were not liable since they did not arrange for disposal as defined under CERCLA).

acts which gave rise to the contamination occurred before CERCLA was enacted. In *Olin*, the Eleventh Circuit specifically states that the district court's ruling on retroactive liability "runs contrary to all other decisions on point."[146] In reaching this conclusion, the *Olin II* court rendered many companies' one ray of judicial hope obsolete.

Until the United States Supreme Court makes a decisive ruling about retroactive liability, companies will continue to argue against retroactive liability. Unless the highest court renders a final decision on this issue, many companies may be reluctant to settle claims regarding retroactive liability, which may delay cleanups across the country. Since a decision from the United States Supreme Court is at least a year away, it is imperative that Congress take a clear stand with respect to retroactive liability as soon as possible.

IV. THE CONGRESSIONAL APPROACH TO RETROACTIVITY

Even though the courts appear settled on whether retroactive liability exists under CERCLA, Congress is divided over whether to keep retroactive liability.[147] Whether one takes the existence of the Congressional debate as supporting the validity of retroactivity, or simply view Congress as confused or trying to correct an erroneous misinterpretation of CERCLA, at some point in the near future, a legislative solution to the question is necessary.

While the debates in Congress over reauthorization of the Superfund do not focus exclusively on the issue of retroactivity under the Act, certain retroactive application of CERCLA liability laws provided the major focus for the last set of arguments in Congress in 1996 that this article examines.[148] In the ongoing debate over reauthorization, the issue of retroactivity is considered one of the divisive "linchpins" of the program.[149]

In 1995, Republican Representative Michael G. Oxley of Ohio and Republican Senator Robert C. Smith of New Hampshire, generated two proposals in the House and the Senate, respectively, which aimed to eliminate retroactive liability.[150]

Senator Smith's proposal initially aimed to eliminate the retroactive liability provision for companies that dumped waste prior to

---

146. *Olin II*, 107 F.3d at 1511.

147. *See* Allan Freedman, *With Bipartisan Deal Elusive, Superfund Effort Dies*, 54 CONG. Q. WKLY. REP. 2044 (1996) [hereinafter Freedman I].

148. *See id.*

149. *See* Allan Freedman, *GOP Woos Democrats in Talks Over New Superfund Plan*, 54 CONG. Q. WKLY. REP. 614 (1996).

150. *See Issue: Superfund*, 54 CONG. Q. WKLY. REP. 31 (1996).

1980, the year the Superfund was enacted.[151] In addition, Senator Smith wanted to change the section of the current liability system that holds only one business responsible for payment of an entire site's cleanup.[152] Senator Smith's proposal would have repealed that section, holding each polluter responsible only for his proportionate share.[153]

Also, Senator Smith placed greater emphasis on cost efficiency in clean-up efforts.[154] His bill would have required the Environmental Protection Agency (EPA) to choose the clean-up remedy that provides the most inexpensive protection for human health and the environment.[155] Another major provision of Senator Smith's bill would have placed a cap on the number of new sites that the EPA

---

151. *See* S. 1285, 104th Cong. § 701(b) (1995).

(iv) NO RETROACTIVE LIABILITY—

(I) Compensatory Restoration—There shall be no recovery from any person under of this section of the costs of compensatory restoration for a natural resource injury, destruction, or loss that occurred prior to December 11, 1980.

(II) Primary Restoration—There shall be no recovery from any person under this section for the costs of primary restoration if the natural resource injury, destruction, or loss for which primary restoration is sought and release of the hazardous substance from which the injury resulted occurred wholly before December 11, 1980.

Id.

152. *See* Allan Freedman, *Senate Plan Would Shift Costs, Narrow Scope of Superfund*, 53 CON. Q. WKLY. REP. 1923 (1995) [hereinafter Freedman II].

153. *See* S. 1285, 104th Cong. § 501 (1995).

(B) CONDUCT PRIOR TO DECEMBER 11, 1980—

IN GENERAL—For any mandatory allocation facility that is otherwise excluded by subparagraph (A), an allocation process shall be conducted for the sole purpose of determining the percentage share of responsibility attributable to activity of each potentially responsible party prior to December 11, 1980.

Id. § 501(b).

(k) EQUITABLE FACTORS FOR ALLOCATION—The allocator shall prepare a non-binding allocation of percentage shares of responsibility to each allocation party and to the orphan share, in accordance with this section and without regard to any theory of joint and several liability based on—

(1) the amount of hazardous substances contributed by each allocation party; (2) the degree of toxicity of hazardous substances contributed by each allocation party; (3) the mobility of hazardous substances contributed by each allocation party; (4) the degree of involvement of each allocation party in the generation, transportation, treatment, storage, or disposal of hazardous substances; (5) the degree of care exercised by each allocation party with respect to hazardous substances, taking into account the characteristics of the hazardous substances; (6) the cooperation of each allocation party in contributing to any response action and in providing complete and timely information to the allocator; and (7) such other equitable factors as the allocator determines are appropriate.

Id. § 501(k).

154. *See* Freedman II, *supra* note 152, at 1923.

155. S. 1285, 104th Cong. § 701(c)(4) (1995).

(3) SELECTION OF RESTORATION METHOD—

When selecting appropriate restoration measures, including natural recovery, a trustee shall select the most cost-effective method of achieving restoration.

could add to the list of Superfund sites.[156] In each of the three years after enactment, the EPA would only be able to add thirty new sites.[157] Finally, Senator Smith's bill gave states more power and potential responsibility with regard to Superfund sites within their borders.[158] According to Senator Smith's bill, states would have been able to chose whether to veto placing a site on the national priorities list, and following federal cleanup standards, cleanup the site on their own.[159]

Representative Oxley's bill, though with similar objectives as Senator Smith's, had its own particular provisions. One difference was a provision directed at small businesses and municipalities that could have affected up to 250 Superfund sites, along with the multitude of businesses that dump into those sites.[160] This provision would have fully exempted some parties from liability if, after June 1995, they had dumped waste at a site that had already accepted municipal solid waste from another party or parties.[161]

Id.

156. *See* Freedman II, *supra* note 152, at 1923.

157. S. 1285, 104th Cong. § 802 (1995).

> (A) LIMITATION—
> During each of the 3 12-month periods following the date of enactment of this subsection, the Administrator may add not more than 30 new vessels and facilities to the National Priorities List.
> (B) PRIORITIZATION—
> The Administrator shall prioritize the vessels and facilities under the subparagraph (A) on a national basis in accordance with the threat to human health and the environment presented by each of the vessels and facilities, respectively.

Id.

158. *See* Freedman II, *supra* note 152, at 1923.

159. S. 1285, 104th Cong. § 201(a) (1995).

> (A) NONCOMPREHENSIVE DELEGATION STATES—
> A non-comprehensive delegation State shall implement each applicable provision of this Act (including regulations and guidance issued by the Administrator) so as to perform each delegated authority with respect to a delegated facility in the same manner as would the Administrator with respect to a facility that is not a delegated facility.
> (B) COMPREHENSIVE DELEGATION STATES—
> (i) IN GENERAL—A comprehensive delegation State shall implement applicable provisions of this Act or of similar provisions of State law in a manner comporting with State policy, so long as the remedial action that is selected protects human health and the environment to the same extent as would a remedial action selected by the Administrator under Section 121.

Id.

160. *See* Allan Freedman, *Oxley Treads a Fine Line in Revising Superfund*, 53 CONG. Q. WKLY. REP. 2990 (1995) [hereinafter Freedman III].

161. *See* H.R. 2500, 104th Cong. § 202(a) (1995).

> (A) EXEMPTION FROM LIABILITY—Subject to subparagraph (B), no person (other than the United States or a department, agency or instrumentality of the United States) shall be liable for costs or damages referred to in subsection (a) with respect to a release or threatened release of a hazardous substance from a facility that—

Another provision of Representative Oxley's bill provided a different kind of exemption for some small businesses.[162] A business could have become exempt from all liability if it contributed less than one percent of the waste to a Superfund site prior to 1987.[163] Representative Oxley chose the 1987 date since that is when record-keeping requirements were fully implemented.[164] The 1987 date pleased many insurance companies because it is also the year that they changed their policies to avoid paying future Superfund-related claims.[165] In addition, Representative Oxley's bill also allowed for government rebates that would come out of the Superfund,[166] and companies that dumped waste before 1987 could apply for reimbursement.[167]

While neither party in Congress was willing to give up in the early stages of drafting and reviewing the proposed bills, each acknowledged that future negotiations regarding the Superfund

---

(i) on June 15, 1995, was listed on the National Priorities list; and

(ii) on or before June 15, 1995, was authorized by the appropriate State or local government to accept, and did accept for disposal household waste (from single and multiple dwellings, hotels, motels, and other residential sources).

Id.

162. *See* Freedman III, *supra* note 160, at 2990.

163. *See* H.R. 2500, 104th Cong. § 203(a) (1995).

(1) DE MINIMIS CONTRIBUTOR EXEMPTION FROM RETROACTIVE LIABILITY—In the case of a facility or vessel not owned by the United States listed on the National Priorities List, no person described in paragraph (3) or (4) or subsection (a) (other than the United States or a department, agency or instrumentality of the United States) shall be liable under subsection (a) for any costs under this section if no activity of such person described in such paragraph (3) or (4)—

(A) occurred after January 1, 1987, and

(B) resulted in the disposal or treatment of more than 1 percent of the volume of materials containing hazardous substances at such facility or vessel.

Id.

164. *See* Allan Freedman, *Businesses May Escape Cleanup Costs*, 53 CONG. Q. WKLY. REP 2174 (1995).

165. *See* Freedman II, *supra* note 152, at 1923.

166. *See* Freedman III, *supra* note 160, at 2990.

167. *See* H.R. 2500, 104th Cong. § 201(a) (1995).

(g) REIMBURSEMENT FOR RETROACTIVE LIABILITY—(1) In the case of a facility or vessel not owned by the United States listed on the National Priorities Lists, a person (other than the United States or any department, agency, or instrumentality of the United States) shall be eligible for reimbursement from the Fund for 50 percent of any costs referred to in Section 107(a) paid or incurred by such person after October 18, 1995, to the extent that—

(A) such person's liability under Section 107 is attributable to a status or activity of such person (as described in paragraph (1), (2), (3), or (4) of subsection (a) that existed or occurred prior to January 1, 1987, and

(B) such costs are attributable to response activities carried out after October 18, 1995.

Id.

program were dependent on the outcome of the 1996 November election.[168]

Members of both parties of Congress accepted that any changes to the Superfund program regarding retroactive liability would rely prominently on bipartisan compromise, and would proceed gradually, if at all.[169] However, after more than a year of concentrated efforts[170] to obtain a bipartisan compromise on Senate Bill 1285, the Republican-developed Superfund bill proposed by Senator Smith was pronounced dead during the week of July 15, 1996.[171] This signified the end of hope for bipartisan agreement for Superfund revision until after the November 1996 elections. Both Democrats and Republicans waited to see if their side might gain more of an upper hand on the issue after the elections.[172] A Dole victory might have led the Republican's to achieve their desired repeal of retroactive liability, while a win for Clinton would imply a more moderate, but still bipartisan, drafting of a compromise.[173]

Now in his second term as President, President Clinton once again must work with a Republican-led Congress. This time, he is even more likely to emphasize moderation on issues, in an attempt to stress bipartisan compromise and balance, especially on sticky topics like the environment.[174] One of the most binding features of the Clinton presidency is the Republican Congress' priority to balance the federal budget.[175] With that priority as a guideline, it is likely to dictate future legislation. Where the Superfund is concerned, debates over making site cleanup even more cost effective, and continuing the push to reduce liability standards to avoid expensive litigation, are not going to go away. Moreover, with less money to spend, President Clinton will be under continual pressure to pursue moderate measures.[176] Republicans will also be stressing moderation and compromise since they realize that they must reach a middle ground with the President and his administration if they want to successfully carry out their own agenda.[177]

---

168. *See id.*

169. *See* Allan Freedman, *Superfund Negotiators Hope For Bipartisan Compromise*, 54 CONG. Q. WKLY. REP. 1041 (1996).

170. *See Issue: Superfund*, 54 CONG. Q. WKLY. REP. 2440 (1996).

171. *See* Freedman I, *supra* note 147, at 2044 (1996).

172. *See id.*

173. *See id.*

174. *See* David Hosansky, *President Expected To Travel Center Lane to 21st Century*, 54 CONG. Q. WKLY. REP. 3222 (1996).

175. *See id.*

176. *See id.* at 3224.

177. *See id.*

Environmental policy will be a challenge for the President and Congress. The ideal middle ground hoped for in other areas is especially distant here due to warring interest groups and fiscal tightening. Environmental policy success lies in creative approaches to old issues, on a more incremental level.[178] In fact, the first Superfund reform bill of 1997 did not explicitly address the issue of retroactive liability.[179] The primary features of the bill were (1) the creation of a fair-share allocation of multiparty sites to replace joint and several liability; (2) the elimination of liability for small contributors; and (3) the provision of $60 million in funding to states and localities to spur the cleanup and redevelopment of sites.[180] Even some of the strongest supporters for the elimination of retroactive liability began the year by conceding that such repeal does not have a chance of surviving Democratic opposition.[181] To date, this bill is still facing committee hearings.[182]

On November 9, 1997 Representative Oxley modified his 1986 bill and reintroduced it as the Superfund Reform Act.[183] Like its predecessor, this bill curtails retroactive liability. For example, retroactive liability would not occur for: (1) releases occurring in connection with arranging for disposal, treatment, transport, or acceptance of hazardous substances prior to 1987 at non-federally owned National Priority Listed facilities; (2) releases at facilities which only handle municipal solid waste or sewage sludge; or (3) de micromis releases.[184] The bill has just begun the committee hearing process.[185]

---

178. *See* Allan Freedman, *President Expected To Travel Center Lane to 21st Century*, 54 CONG. Q. WKLY. REP. 2818 (1996).

179. Senate Bill 8, the Superfund Cleanup Acceleration Act, was introduced before the Senate on January 21, 1997, by Senator Bob Smith and his co-sponsor, Senator John Chafee of Rhode Island. *See Bill Introduces Fair-Share Cleanup Liability*, 4 INS REG 9, *available in* 1997 WL 7880063.

180. *See id.*

181. *See* Miles Moore, *GOP Makes 2nd Try at Superfund Reform*, TIRE BUS., Feb. 3, 1997.

182. *See Bill Summary & Status for the 105th* Congress (visited January 4, 1998) <http://thomas.loc.gov>. As of Sept. 4, 1997, hearings on Senate Bill 8 were occurring in the Committee on Environment and Public Works. *See id.*

183. *See* H.R. 3000, 105th Cong. (1997). Thirty-nine representatives co-sponsored this bill. *See id.* Including this bill and Senate Bill 8, members of Congress have introduced at least fifteen other bills to amend CERCLA. *See Bill Summary & Status for the 105th Congress*, (viewed Jan. 17, 1998) <http://thomas.loc.gov>.

184. *See id.* § 201(a). In addition, this bill absolves of liability certain owners or operators who acquired the contaminated facility by inheritance or bequest. It also limits liability for certain owners or operators who are tax-exempt organizations and certain municipalities and other owners of National Priority Listed landfills. The bill exempts from liability: (1) construction contractors whose liability is based solely on a contracted construction activity at the facility; (2) certain railroad owners or operators of spur tracks; or (3) persons whose liability is based on a status as a holder of a pipeline right-of-way or easement or of a gas or oil lease if such a person does not cause or contribute or consent to the release or threat of release. *See id.*

V. CONCLUSION: A LEGISLATIVE SOLUTION

Despite the fact that current legislative proposals do not provide for a repeal of retroactive liability, the issue is still a matter of concern to many in Congress.[186] As noted previously, this issue is one that needs immediate resolution. Adding to the pressures to overhaul the program, is the unknown future role of industry taxes that have, until recently, helped to pay for the cleanup program.[187] The taxes actually expired December 31, 1995,[188] though the program can be successfully funded by a surplus until fiscal year 2000.[189] However, some parties involved do not want to reauthorize these taxes until there is greater certainty that Congress will successfully overhaul the Superfund program.[190] This pending funding limitation, suggested by leaders of the authorizing committees, is aimed to pressure Congress to revise the Superfund program.[191]

The legitimacy of retroactive liability cannot be delayed while Congress waits to make a decision on the future role of industry taxes. Congress needs to settle the issue of retroactive liability by amending the act with language such as: "Liability under this act is retroactive." Even though many Republicans oppose maintaining the provision for retroactive liability on the grounds that it is unfair to punish companies for actions that, when carried out, were fully legal,[192] the limitations introduced in House Rule 3000 should not alter how courts presently apply retroactive liability. Even though several Republicans argue that being more lax with liability standards will slow down the clutter of litigation that now consumes the time and focus of many companies, preventing them from overseeing the actual cleanup of their sites,[193] any laceration may result in individual tax payers paying for the clean up.[194]

---

185. *See Bill Summary & Status for the 105th Congress* (visited January 4, 1998) <http://thomas.loc.gov>. On Nov. 9, 1997 the bill was referred to the Committee on Commerce, the Committee on Transportation and Infrastructure, and Ways and Means. *See id.*

186. "I would like to eliminate retroactive liability .... It is 'fundamentally un-American .... I will die hard on this issue,' says Representative Shuster." Mark Hoffman, *Superfund Reform Redux: Calls to Repeal Retroactive Liability Continue, Legislators Say*, 2 BUS. INS., 1997 WL 8293787.

187. *See* Freedman I, *supra* note 147, at 2044.

188. *See id.*

189. *See id.*

190. Rep. Archer, Chair of the House Ways & Means Comm., said that he will do what he can to ensure that taxes to refinance the Superfund will not be re-authorized until the program has been completely reformed. *See* Hoffman, *supra* note 186.

191. *See* Freedman I, *supra* note 147, at 2044.

192. *See id.*

193. *See id.*

194. *See infra* note 200 and accompanying text.

There is another equally persuasive unfairness argument. A number of companies have had substantial retroactive liabilities imposed upon them, but they have already resolved most of them.[195] Therefore, not only do they have little to gain from the repeal, but they have been placed at a disadvantage vis-à-vis their competitors who have not been good corporate citizens and who have managed to thus far evade their liability for hazardous sites created prior to 1980.[196] Thus, in terms of fairness, the case for retaining retroactivity seems to be stronger.

An additional consideration concerns companies involved with lawsuits against their insurers for remediation costs from settlements with the EPA. These companies might find that courts will hold that since there is no retroactive liability, settlements paid for a form of liability that does not exist are merely gratuitous.[197] Such a result would be extremely unfair.

Easing up on liability standards for companies sends a strong message to polluters that they can easily shake the blame for pollution and environmental damage and simply let the federal government pay for the costs of cleaning up polluted sites.[198] In addition, a full repeal of retroactive liability is not cheap. The Congressional Budget Office reported that repealing retroactive liability would cost the federal government from $800 million to $1.3 billion a year.[199] As a result, taxpayers would likely become the targets to bear the burden of cleaning up many sites, even when the company responsible for the costly damages is known.[200] Much of the tax burden for Superfund has thus far fallen on the chemical and petroleum companies. When these taxes are reauthorized, if there is not retroactive liability, a most logical source of money will be could come from an increase chemical and petroleum companies' taxes.

Major opponents of repealing retroactive liability, like Carol Browner, administrator of the EPA, allege that a repeal would only prolong the cleanup process, require more money from taxpayers, and send the wrong message to polluters.[201] If correct, such allegations further support the need for Congress to pass a simple

---

195. *See* Tucker, *supra* note 76, at C1.

196. *See id.*

197. *See id.*

198. *See* Allan Freedman, *Superfund Cleanup*, 54 CONG. Q. WKLY. REP. 544 (1996).

199. *See* Allan Freedman, *Superfund Rewrite Focuses on Retroactive Liability*, 53 CONG. Q. WKLY. REP. 1173 (1995).

200. *See id.*

201. *See* Allen Freedman, *Administration Opposes GOP's Superfund Bill*, 54 CONG. Q. WKLY. REP. 1167 (1996).

amendment to CERCLA, clearly stating that the liability under the act is retroactive.

The legitimacy of retroactive liability will not be resolved until the United States Supreme Court speaks or Congress takes action. A careful review of *Olin* and subsequent cases leads to the conclusion that if the issue reaches the Supreme Court, the Court will likely uphold retroactive liability. However, an appeal of *Olin* to the highest court for resolution of this issue will take at least another year. There is no point in waiting over a year for the court to act; Congress should take action itself by affirming the act's retroactive liability.